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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 881

RALPH SHUE,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

RALPH SHUE,
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VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, RALPH SHUE, prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of that court affirming the judgment of the United States District Court for the Middle District of North Carolina.

The opinion of the United States Court of Appeals for the Fourth Circuit is set forth as follows:

> Appeal from the United States District Court for the Middle District of North Carolina, at Wilkesboro, Edwin M. Stanley, District Judge.
>
> (Argued October 6, 1967. Decided November 6, 1967.)

Before Haynsworth, Chief Judge, and Craven and Butzner, Circuit Judges.

J. Patrick Adams for Appellant, and William H. Murdoch, United States Attorney, H. Marshall Simpson, Assistant United States Attorney, on brief for Appellee.

PER CURIAM:

We find no unreasonable search of this defendant convicted of a whisky offense.

On the night in question, agents, from afar, observed highly suspicious activity at the house of a codefendant. Later, they smelled the odor of illicit whisky, which, with what they observed by sight and hearing, clearly gave them probable cause to believe an illicit still was being operated and its product packaged. As one agent approached the home, he saw the defendant on the porch loading a case of whisky into an automobile. The defendant dropped the case of whisky and attempted to flee, but was captured.

There was no unlawful entry upon the curtilage. The earlier observations of the agents gave them ample cause to believe a felony was being committed. Had they departed to seek a search warrant, it was not unlikely that the participants and the contraband would be gone when the agents returned.

When they entered upon the curtilage, the defendant was in plain view on the porch. There was no search of him.

Affirmed.

JURISDICTION

The petitioner seeks a review of the judgment entered by the United States Court of Appeals for the Fourth Cir-

cuit which judgment was entered on the 6th day of November, 1967. Jurisdiction of this court is sought to be invoked pursuant to Title 28, U. S. C. Section 1254.

QUESTION PRESENTED

Does the Fourth Amendment to the Constitution of the United States allow a Federal Officer to enter private premises, at night, without a search warrant, or a warrant of arrest, and make an arrest and subsequent search of the premises for violation of the Internal Revenue laws relating to distilled spirits upon information gained after entry upon the premises?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment Four to the Constitution of the United States, Title 26 U. S. C. Sections 5601, 5205, 5604, 5179 and 5173.

STATEMENT OF THE CASE

The petitioner was charged with another defendant in a Bill of Indictment containing four separate specific counts:

(a) Possessing or controlling distilling apparatus for production of liquor without registration.

(b) Carrying on the business of distillers of liquor without bond.

(c) Making ferminted mash fit for distillation.

(d) Possessing 185 gallons of non-taxpaid liquor.

Prior to the case coming on for trial in the District Court, the petitioner, in apt time, filed a written motion to suppress the evidence on the grounds that the arrest and

search were secured by means of an unlawful arrest and search in violation of the Fourth Amendment to the Constitution of the United States. The motion of the petitioner was denied by the District Court.

The petitioner was tried by the Court and found guilty of Count (d) whereupon the District Court entered the following judgment:

> "It is adjudged that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for five years."

Notice of Appeal to the Court of Appeals for the Fourth Circuit was filed by the petitioner in apt time.

For the conviction of the petitioner, the United States relied upon the following circumstances:

On December 4, 1966, officers of the Alcoholic and Tobacco Tax Unit went to the area known as Shepards Cross Roads in a section of Wilkes County, North Carolina, and located a distillery in the vicinity of the home of Rex Holloway. The distillery was situated 250 yards from Holloway's residence and across a plowed field in an old house which foliage had grown up around.

About 9:30 p.m. on December 5, the officers staked themselves out on the Holloway premises. The officers did not have a search warrant for the Holloway premises.

Officer Carter observed a vehicle go to the house of Rex Holloway and observed five-gallon cans being loaded from a truck to the upper story of the house. He was unable to identify the man in the back of the truck. The truck left in about thirty minutes. A truck then came to the house and unloaded cardboard cartons. Thereafter, two men left the

house and walked on a road leading toward the distillery and about thirty minutes later came back.

The officers continued to observe the house and distillery until about 4:00 a.m. on December 6, 1966. Agent Carter moved to a position about 150 yards from the residence. He heard a car coming off a paved road and down to the driveway of the house. He then moved some 50 yards from the residence and hid himself. The agent smelled the odor of whiskey in the area. A car drove up and someone got out and went into the house. Later, another car came to the house and unloaded what appeared to be a metal drum or barrel from the car at the end of the house. The agent observed some bumping sounds in the house and persons walking about therein. Agent Carter continued to watch until 6:00 a.m. when it began to get a little light and then moved around and in back of the house. About this time a 1966 Plymouth backed up to the front porch. This car had been at the house since 4:00 a.m. The agent then moved near the house and heard people bringing objects out and putting them on the front porch. As the agent looked around the corner he observed the defendant Ralph Shue standing by the rear of the car. Ralph Shue had one carton in his hand. Agent Carter then ran toward Mr. Shue and placed him under arrest. Mr. Shue dropped the carton and 6 one-gallon plastic jugs fell on the ground. The agent then entered the house and searched it and arrested the defendant Holloway. The carton which Mr. Shue dropped contained non-tax paid whiskey and several more gallons were found in the house and in the trunk of the Plymouth automobile. In the house was a filtering plant and several empty plastic jugs. The officers then examined the abandoned house which was approximately 250 yards from the Holloway residence and found a 280 gallon metal pot type distillery.

It was stipulated by the government and counsel for the defendant Rex Holloway had under lease the house and out building referred to in the testimony, and that this lease included all the property referred to in the testimony which lies west of the hard surface road from which the driveway to the Holloway home enters.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an Indictment charging petitioner and another with violations of criminal statutes under the Internal Revenue Code of 1954 (as amended) Title 26 U. S. C. Sections 5601, 5222, 5205, 5604, 5179 and 5173. This is the basis for federal jurisdiction in this action.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of the United States, the Court of Appeals and Federal District Courts and specifically in conflict with the following:

Baxter vs. U. S., (6th Cir.) 188 F. 2d 119 (1951)

Hobson vs. U. S., (8th Cir.) 226 F. 2d 890 (1955)

Johnson vs. U. S. 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948)

Jones vs. U. S. 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 687 (1960)

Kroska vs. U. S. (8th Cir.) 51 F. 2d 330 (1931)

Taylor vs. U. S. 286 U. S. 1, 52 S. Ct. 466, 76 L. Ed. 951 (1932)

U. S. vs. Mullins (4th Cir.) 329 F. 2d 295 (1964)

The appellant contends that Federal officers, without a search warrant, committed an illegal search and seizure which violated the appellant's Fourth Amendment rights.

It appears to be clear that the appellant may invoke the Fourth Amendment for his own protection, although this was not his home. The case of *Jones vs. United States* 362 *U. S.* 257, 4*L. Ed.* 2*d* 687, 80 *S. Ct.* 725 (1960) states as follows:

> "Although those wrongfully present upon premises cannot invoke the privacy of these premises by motion to suppress the use as evidence of property seized in a search of the premises, anyone legitimately on premises where a search occurs may challenge the legality of the search by way of a motion to suppress."

No evidence was presented by the Government showing that Shue was a trespasser, nor that he didn't have a right to be on the premises of Holloway.

It was stipulated that Holloway had under lease the house, out buildings and all property lying west of the hard-surface road upon which the officers had entered.

For the purpose of argument it may be conceded that the officers had probable cause for the issuance of a night-time search warrant, but the officers failed to make application for one even though a United States Commissioner was only 12 miles away. Probable cause for the issuance of a search warrant does not justify a search without a warrant. In *Jones vs. United States,* supra the Court said:

> "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without."

In the case of *Taylor vs. United States* 286 *U. S.* 1, 52 *S. Ct.* 466, 76 *L. Ed.* 951 (1932), the Court said,

"The decisions of this court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizens from unwarranted intrusion into their privacy."

"This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law enforcement officers justify the issuance of a search warrant." *Johnson vs. United States* 333 *U. S.* 10, 68 *S. Ct.* 367, 92 *L. Ed.* 436 (1948).

"Were Federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home the provisions of the Fourth Amendment would become empty phrases and the protection it affords largely a nullity."

Johnson vs. United States, supra.

The appellant contends that the evidence obtained by the Government was obtained while within the curtilage of the Holloway residence.

A farmyard was held to be within the curtilage of a home, and therefore, the resident had the protection of the Fourth Amendment for this area. *Kroska vs. United States* (*8th Cir.*) 51 *F. 2d* 330 (1931).

The enclosed backyard of the defendant's home is subject to the same protection as the home itself. *Hobson vs. United States* (*8th Cir.*) 22 6 *F. 2d* 890 (1955).

A smokehouse 75 feet from a residence has been held to be within the curtilage. *United States vs. Mullins* (*4th Cir.*) 329 *F. 2d* 295 (1964).

If we assume that the house where the still was located and the other outbuilding was not within the curtilage and not within the Fourth Amendment protection, the appellant contends that all the evidence obtained by the Government against him was obtained while making a search of the curtilage.

The testimony of Agent Carter in the present case shows that as to the appellant he was observed from just behind the Holloway house. It further shows that nothing definite was determined until the officer was against the house, only a few feet away from the appellant.

In the *Jones* Case, supra, officers watched a house from late evening until 9:00 p.m. after dark. A truck entered a yard and went out of sight. Loud noises were heard and when the truck came back it got stuck in the petitioner's driveway. Officers arrested the men and found liquor on the truck. At that time another car came into the yard and the petitioner and his wife rushed into the house. Officers entered the house and found liquor. The Court held that the search was illegal for lack of a nighttime search warrant.

The case of *Baxter vs. United States* (*6th Cir.*) 188 *F. 2d* 119 (1951) is similar to the present case. ATU officers received reliable information about 2:00 p.m, that appellant was storing whiskey in his house. Without a warrant, two officers went to appellant's premises and stationed themselves in a cornfield adjacent to a garage about 25 feet from the house. There was a fence separating the cornfield and the house. About 9:00 p.m. a truck drove up and backed up to the appellant's house and there was some conversation between persons inside and outside the house. As cartons were being unloaded, the officers jumped the fence and approached the house. One of the men dropped a carton of liquor and the officer smelled whiskey. Officers ar-

rested him and occupants of the house. The officers searched the premises.

The Court held that the appellant's motion to suppress the evidence should have been allowed. The court said that this was not an emergency situation requiring immediate action by the officer. The Court said:

> "Here we have a search of the curtilage, *Roberson vs. United States, 6th Cir.* 165 *F. 2d* 752, 754, and an entry and search of a dwelling house. Moreover, the agents received their information at least by 2:00 p.m. in the afternoon, in Newport, Tennessee where there was a United States Commissioner and it was clearly feasible to apply for the necessary warrant."

The testimony of Agent Carter, that he smelled the odor of liquor some 50 yards from the Holloway residence was not sufficient basis for a search of the Holloway premises. In *United States vs. Mullins,* supra Judge Bell said:

> "Odors associated with contraband that lead a reasonable man to believe that a crime has been committed have been recognized as valid basis on which to seek a search warrant." *Johnson vs. United States* 286 *United States* 1, 525 *Ct.* 466 76 *L. Ed.* 951 (1932); *Monnette vs. United States* 299 *F. 2d* 847 (5 *Cir.* 1962).

The Supreme Court has recently reaffirmed the principle, however, that such observations, while furnishing probable cause for the issuance of a warrant will not suffice to justify a search and seizure without a warrant."

The case of *Johnson vs. United States,* supra, is perhaps the most cited case dealing with the law of search and seizure in this area. The Court in that case held that facts

known to police officers would constitute sufficient evidence to justify the issue of a search warrant will not justify the officers making a search without a warrant, particularly where no reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to the magistrate, and no suspect was fleeing or likely to take flight, the search was of permanent premises and not evidence or contraband was threatened with removal or destructions.

Appellant contends that the officers had sufficient time and reason for getting a search warrant. He further contends that this was obviously not an emergency situation in which officers had to take immediate measures. Officers had information about the premises at least one day prior to any arrest.

Your petitioner respectfully prays that the Court grant the Petition for a Writ of Certiorari for the reasons as set forth above.

RESPECTFULLY SUBMITTED

William L. Osteen
J. Patrick Adams

Attorneys for Petitioner
Both of Greensboro, N. C.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 881

RALPH SHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by the court without a jury in the United States District Court for the Middle District of North Carolina of possessing whiskey in containers on which revenue stamps had not been placed, in violation of 26 U.S.C. 5205(a)(2) and 5604 (a)(1). He was sentenced to imprisonment for a period of five years (1 R. 7–8; 3 R. 6, 64–65, 78). The court of appeals affirmed (Pet. 2).

The sole question presented is whether the court should have sustained the motion by petitioner and his co-defendant to suppress as evidence whiskey and distilling equipment seized at the time of their arrest without a warrant. By agreement, the evidence on this

issue was heard at the same time as the trial before the court (3 R. 9). Agent Carter of the Alcohol and Tobacco Tax Division testified that on the evening of December 5, 1966, he and two other agents went to a farm leased by co-defendant Holloway in Wilkes County, North Carolina. From a concealed position, Carter observed a dilapidated house about 250 yards from the Holloway house, next to which a truck had drawn up. The truck moved over to the Holloway house and somebody in the truck handed up to the second story or attic of the house what appeared to be five-gallon cans (3 R. 10–12, 62–63). The truck then left the premises. About thirty minutes later the same or a similar truck entered the premises and a large number of cardboard cartons of the size and shape used for containing several one-gallon plastic jugs were handed up to the attic of the Holloway house. Other movements between the two buildings were seen during the course of the night (3 R. 12–13).

About four o'clock in the morning, a passenger car drove into the yard. Someone removed a metal drum and took it into the house. The sound of bumping cans was heard and Carter detected the odor of distilled spirits (3 R. 13–15). At about six o'clock, a 1966 Plymouth convertible was driven in and backed up to the front porch. Carter moved in closer and saw petitioner standing by the open trunk of the car, which contained several cardboard cartons. Carter ran up and told petitioner he was under arrest. Petitioner dropped the carton he was holding and started running. Carter caught him after a short distance and

brought him back. Six one-gallon jugs had fallen out of the carton which petitioner had been holding. Seven more cartons containing non-taxpaid distilled spirits were on the front porch. Carter entered the house and placed Holloway under arrest (3 R. 15–17). Carter and the other agents, who had now joined him, searched the house and found 95 gallons of non-taxpaid liquor. An unlicensed distillery was found in the dilapidated house (3 R. 16–19).

The district court denied the motion to suppress, finding that the arrest of petitioner and the search of the Plymouth were lawful. It also concluded that the agent had the right to enter the house and arrest Holloway and to search the house incident to that arrest (3 R. 61–64). The court noted that it was immaterial to a decision of the case whether the officers lawfully searched the upstairs of the house where additional whiskey was found, since the whiskey found in the trunk of the Plymouth, on the ground and on the front porch clearly sustained the charge (3 R. 61–62).

The agents had statutory authority to arrest without a warrant on probable cause to believe that petitioner and his confederate were committing a felony in violation of the liquor laws. 26 U.S.C. 7608. The facts recited above amply established probable cause for petitioner's arrest. Seizure incident to this arrest of non-taxpaid whiskey in the open automobile trunk, on the ground and on the front porch did not even involve a search since the material was fully exposed

to view. *Hester* v. *United States,* 265 U.S. 57; *Ker* v. *California,* 374 U.S. 23, 36–37.[1]

Petitioner seeks to focus attention upon the claimed illegality of the seizure of additional non-taxpaid whiskey within the Holloway house. Since this seizure was clearly incident to the arrest of Holloway, the situation here is distinguishable from that in *Jones* v. *United States,* 357 U.S. 493, 497, upon which petitioner appears to rely (see Pet. 9). In any event, the trial court here expressly stated that consideration of this evidence was unnecessary to its determination of petitioner's guilt (*supra,* p. 3). Thus, *Johnson* v. *United States,* 333 U.S. 10, which involved a warrantless search of a home, is similarly inapposite here, and petitioner's reliance thereon (Pet. 10–11) is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

JANUARY 1968.

[1] That petitioner might have had standing to move to suppress evidence illegally seized from the Holloway premises, under *Jones* v. *United States,* 362 U.S. 257, 267 (see Pet. 7), is irrelevant where, as here, no search occurred. As the court of appeals stated, "When [the agents] entered upon the curtilage, the defendant was in plain view on the porch. There was no search of him" (Pet. 2).

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